PUBLICATION INFORMATION:

Helm Financial Corp. v. Iowa Northern Ry. Co., ___ F. Supp. 2d ___, 2002 WL 1715675 (N.D. Iowa June 17, 2002) (with original ruling on cross-motions for summary judgment)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

HELM FINANCIAL CORPORATION, Plaintiff, vs. IOWA NORTHERN RAILWAY COMPANY, Defendant.	No. C 01-3006-MWB **MEMORANDUM OPINION AND ORDER REGARDING DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT**

This matter comes before the court pursuant to defendant IANR's June 12, 2002, "Motion to Alter or Amend Judgment." IANR's motion, like Helm's prior motions to correct and to alter and amend judgment, challenges portions of this court's May 31, 2002, Memorandum Opinion and Order Regarding the Parties' Cross-motions for Summary Judgment. IANR contends that the court erred as a matter of law and fact in granting summary judgment on the parties' various claims, defenses, and counterclaims concerning breach of the IANR Lease.

As this court recently explained in *EEOC v. American Home Products Corp.*, 165 F. Supp. 2d 886 (N.D. Iowa 2001), although the Federal Rules of Civil Procedure do not seem to provide any basis for a motion to reconsider this court's *granting* of partial summary judgment, that means that this court actually has more, rather than less, discretion to alter or amend such an interlocutory order than is provided by either Rule 59(e) or Rule 60(b) of the Federal Rules of Civil Procedure. *See American Home Prods. Corp.*, 165 F. Supp. 2d at 892. This court has also held that courts retain the power to reconsider and revise an order *denying* summary judgment, which is also interlocutory in nature, up until the time a final judgment is entered. *See Longstreth v. Copple*, 189 F.R.D. 401, 403 (N.D. Iowa

1999). Therefore, the court has the authority to alter or amend the portions of its May 31, 2002, Memorandum Opinion and Order Regarding the Parties' Cross-motions for Summary Judgment, in light of IANR's challenges, should the court decide that it is appropriate or necessary to do so. As with the court's disposition of Helm's prior motions to correct, alter, or amend the same summary judgment ruling, under the circumstances presented here, the court finds it unnecessary to wait for the opposing party's resistance before ruling on the present motion to alter or amend the May 31, 2002, ruling.

In its motion to alter or amend, IANR contends that the court erred as a matter of law and fact in concluding that the parties did not reach an agreement on the terms of an amended lease in the form of Helm's September 29, 2000, offer and IANR's October 6, 2000, response—an agreement that IANR contends Helm subsequently breached. Specifically, IANR contends that there are at least genuine issues of material fact, under the proper legal standard, that its addition of terms to Helm's September 29, 2000, offer did not constitute a "counteroffer" that Helm never accepted. IANR also contends that the court mistakenly relied on IANR's purported failure to generate genuine issues of material fact regarding Helm's or the industry's practice to allow inspections prior to leasing locomotives *in 1995*, when the pertinent time frame of the disputed lease amendment was *September to October of 2000*. IANR contends that these errors require reinstatement of its counterclaim for breach of contract regarding the IANR Lease, as well as trial on Helm's breach-of-contract claim regarding the IANR locomotives and at least some of IANR's defenses to that claim.

The court acknowledges that there is, indeed, a typographical error on page 57 of the slip opinion of its ruling on the parties' cross-motions for summary judgment. Because of that typographical error, the court misidentified the time period for which IANR failed to generate a genuine issue of material fact as to Helm's and the industry's practice on inspections of locomotives prior to leasing. The error should be corrected as follows, with

strikeouts showing deletions and bold text showing corrections:

> IANR's attempt, in its resistance to Helm's second motion for summary judgment, to generate a genuine issue of material fact on this question [*i.e.*, the question of whether or not Mr. Collins's addition to Helm's September 29, 2000, offer constituted a counteroffer] by arguing that the term inserted by Mr. Collins did not vary from either Helm's or the industry's practice, and thus, did not constitute a counteroffer, fails, even assuming it is based on a correct legal premise, where IANR has presented no evidence demonstrating either Helm's or the industry's purported practice in ~~1995~~ **2000**. Thus, IANR failed to designate "specific facts showing that there is a genuine issue for trial" on this issue. FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324; *Rabushka*, 122 F.3d at 562; *McLaughlin*, 50 F.3d at 511; *Beyerbach*, 49 F.3d at 1325.

Memorandum Opinion and Order Regarding the Parties' Cross-motions for Summary Judgment, May 31, 2002, slip op. at 57. However, IANR disputes this conclusion, as a matter of law and fact, even as corrected, as well as certain other conclusions regarding the breach-of-contract claims, defenses, and counterclaims involving the IANR Lease.

IANR contends that the court erred, as a matter of law, by holding that the applicable standard for counteroffers under California law is the following: "'[T]erms proposed in an offer must be met exactly, precisely and unequivocally for its acceptance to result in the formation of a binding contract [citations]; and a qualified acceptance amounts to a new proposal or counteroffer putting an end to the original offer. . . .'" *Panagotacos v. Bank of Am.*, 60 Cal. App. 4th 851, 855-56, 70 Cal. Rptr. 2d 595, 597 (1998) (quoting *Apablasa v. Merritt & Co.*, 176 Cal. App. 2d 719, 726, 1 Cal. Rptr. 500 (1959)). IANR contends, instead, that the governing standard under California law is found in § 2207 of the California Commercial Code. There are several reasons why IANR's assertion of this provision now as the applicable legal standard does not change the court's conclusions in the summary judgment ruling regarding claims involving the IANR Lease.

First, although Helm expressly cited and relied on the *Panagotacos* decision as stating the applicable standard under California law for determining whether the addition of terms to an offer constitutes a counteroffer, IANR never disputed that standard with a citation to any other authority, statutory or decisional, prior to its motion to alter or amend the summary judgment ruling. Certainly, nowhere in its briefing of the various cross-motions for summary judgment has the court found any reference by IANR to § 2207. The court was not required to accept IANR's unsupported assertion that some other legal standard should apply and IANR's failure to cite any authority for any different legal standard constitutes a waiver of its present contentions.

Moreover, under the standard as stated in *Panagotacos*, which IANR never properly disputed, this court correctly concluded that Pete Collins's handwritten addition to Helm's September 29, 2000, proposal, which stated, "Subject to inspection and approval by Iowa Northern," Helm's Appendix to First Motion for Summary Judgment at 42 (September 29, 2000, letter), constituted a counteroffer, because Collins's response did not constitute an "exac[t], precis[e] and unequivoca[l]" acceptance of Helm's offer. *Panagotacos*, 60 Cal. App. 4th at 855-56. As the court pointed out in its summary judgment ruling, Collins admitted in deposition that he did not consult with or obtain the agreement of anyone from Helm before making this addition. Helm's Appendix to First Motion for Summary Judgment at 86 (Deposition of Pete Collins at 84-85). IANR's counteroffer was never accepted, notwithstanding Mr. Collins's contention in his deposition that Helm must have accepted it by permitting IANR's inspector to examine proffered locomotives, because Helm never signified any "exac[t], precis[e] and unequivoca[l]" acceptance of IANR's counteroffer, *see Panagotacos*, 60 Cal. App. 4th at 855-56, instead refusing to make any of the repairs IANR requested after inspecting the proffered locomotives. Helm's Appendix to First Motion for Summary Judgment at 43 (Exhibit 9, Letter of October 31, 2000).

Second, even if § 2207 states the applicable standard, IANR failed to generate

genuine issues of material fact that a binding agreement was reached to amend the IANR Lease in October 2000 on the basis of its submissions either prior to the court's summary judgment ruling or in its present motion to alter or amend that ruling. The statutory provision on which IANR now relies provides as follows:

> **§ 2207. Additional terms in acceptance or confirmation**
>
> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> (a) The offer expressly limits acceptance to the terms of the offer;
>
> (b) They materially alter it; or
>
> (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
>
> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code.

CAL. COM. CODE § 2207. "Section 2207 replaces the common law 'mirror image' rule which required an acceptance to 'mirror' the offer, i.e., to reiterate all terms and conditions exactly," replacing it with a rule that "the common law counteroffer becomes an acceptance if it contains a 'definite and seasonable expression of acceptance' and, between merchants, the additional terms of the 'counteroffer' become a part of the contract." *Transwestern Pipeline Co. v. Monsanto Co.*, 46 Cal. App. 4th 502, 514, 53 Cal. Rptr. 2d 887, 893 (1996);

see also Steiner v. Mobil Oil Corp., 569 P.2d 751, 757 (Cal. 1977) ("Section 2207 rejects the 'mirror image' rule," replacing it with "inquir[y] as to whether the parties intended to complete an agreement"). However, "[t]he foregoing rule does not apply if the offeree expressly conditions its acceptance on the offeror's assent to the offeree's additional terms." *Transwestern Pipeline Co.*, 46 Cal. App. 4th at 514, 53 Cal. Rptr. 2d at 893 (citing § 2207(1)). Also, the statute itself states that the terms added by the offeree do not become part of the contract if any of three conditions is present: (1) "[t]he offer expressly limits acceptance to the terms of the offer," CAL. COM. CODE § 2207(2)(a); (2) the additional terms "materially alter" the offer, *id.* at § 2207(2)(b); or "[n]otification of objection to [the additional terms] has already been given or is given within a reasonable time after notice of them is received." *Id.* at 2207(2)(c).

Although Helm's September 29, 2000, offer plainly states that "[t]his letter will summarize Helm's current offer to supply locomotives to the Iowa Northern," *see* Helm's Appendix to First Motion for Summary Judgment at 42 (September 29, 2000, letter), which is a fairly emphatic suggestion that these terms, and no others, are acceptable to Helm, the court stops short of concluding, as a matter law, that Helm's offer expressly limited acceptance to the terms of the offer. *See* CAL. COM. CODE § 2207(2)(a). However, the court does conclude, as a matter of law, that IANR's acceptance was "expressly made conditional on assent to the additional or different terms." *See id.* at § 2207(1); *Transwestern Pipeline Co.*, 46 Cal. App. 4th at 514, 53 Cal. Rptr. 2d at 893 (citing § 2207(1)). Mr. Collins's handwritten addition expressly made IANR's acceptance "[s]ubject to inspection and approval by Iowa Northern." Helm's Appendix to First Motion for Summary Judgment at 42 (September 29, 2000, letter). As the California Court of Appeals has explained, "All that section 2207, subdivision (1) requires [to make acceptance conditional on assent to the offeree's additional terms] is a clear expression 'in a manner sufficient to notify the offeror that the offeree is unwilling to proceed with the transaction

unless the additional or different terms are included in the contract." *PMC, Inc. v. Porthole Yachts, Ltd.*, 65 Cal. App. 4th 882, 888, 76 Cal. Rptr. 2d 832, 835 (1998). Making IANR's acceptance "subject to" the additional conditions of inspection and approval of the locomotives is, as a matter of law, "a clear expression 'in a manner sufficient to notify [Helm] that [IANR] is unwilling to proceed with the transaction unless the additional or different terms are included in the contract." *Id.* Moreover, Helm pointed to record evidence that the right to inspect and approve the new locomotives was an important issue to IANR, *see* Helm's Statement of Material Facts in Support of Helm's Second Motion for Summary Judgment, ¶ 12, and IANR admitted that fact. *See* IANR's Response to Helm's Statement of Material Facts (Docket #134, May 6, 2002). Helm never assented to the additional or different terms included by Mr. Collins, either in written form or by conduct, as explained more fully below.

Also, the court concludes, again as a matter of law, that the additional terms added to Helm's offer by Mr. Collins *did* "materially alter" Helm's offer. *See* CAL. COM. CODE § 2207(2)(b). Again, IANR has not properly generated a genuine issue of material fact that the right of inspection and approval of the locomotives was not "important" to IANR. Instead, IANR asserts that the additional terms did not materially alter Helm's offer, or that it has at least generated a genuine issue of material fact that the additional terms did not materially alter the offer, because it has pointed to record evidence that Helm's and the industry's practice recognized the right of a leasing party to inspect a locomotive prior to leasing or purchasing. In support of this contention in its motion to alter or amend, IANR points only to certain deposition testimony of Phil Warner, a vice president of Helm, consisting of the following exchange:

> Q. You agree with me that inspecting locomotives by a potential lessee is a customary practice within the locomotive industry, you would expect that a railroad would want to inspect locomotives before leasing them?

> A. I would say that in my experience in working with Helm in leasing and selling locomotives that perspective [sic] lessees and/or perspective [sic] buyers prefer to inspect the locomotives prior to leasing them or buying them.

IANR's Second Supplemental Appendix Re: First and Second Motions for Partial Summary Judgment and Helm's Motions for Summary Judgment Re: Amended Pleadings, 342 (Deposition of Phil Warner at p. 89, *ll*. 1-10). Although IANR may have asked the precise question concerning customary practice within the locomotive industry on inspections by lessees, IANR did not receive the kind of unequivocal affirmative response from Helm that could possibly be construed as an admission concerning industry practice. Rather, a statement by a representative of Helm that "pr[o]spective lessees . . . *prefer* to inspect the locomotives prior to leasing them," *id.* (emphasis added), utterly fails to generate any genuine issue of material fact that it is either Helm's or the industry's practice *actually to permit* either inspection or approval of units offered pursuant to a lease.

Although IANR also repeatedly asserted prior to the court's summary judgment ruling that Helm's and the industry's practice was to permit inspection and approval, the court cannot find that IANR designated any record evidence generating genuine issues of material fact that it was Helm's practice to do so *in 2000*, that IANR knew or believed that it was Helm's practice to do so *in 2000*, or that it was the "industry practice" to do so *in 2000*.**3**[1] For example, while disputing Helm's contention that Mr. Collins's additions constituted a counteroffer, IANR asserted "IANR's right to inspect, its right to expect that locomotives would meet minimal industry practices, and its right to expect that if the offered locomotives were deficient IANR would have the opportunity to look at others in Helm's inventory were in conformity with the negotiations, with Helm practices and with industry

[1] *See supra*, page 2 (correcting the time frame for which IANR failed to generate a genuine issue of material fact on Helm's or the industry's practice in this regard).

custom," such that "[t]he right to inspect required neither express description in the Amended Lease Agreement nor additional consideration." IANR's Response to Helm's Statement of Material Facts (Docket #134, May 6, 2002), ¶ 12. However, IANR fails to cite with these assertions any portion of the record supporting them. *See id.* IANR's citation to deposition testimony of Francois Bernard, Helm's Chief Mechanical Officer, that he ordinarily required certain inspections and repairs prior to offering locomotives for lease, *see id.*, does not support a claim that *lessees* were ordinarily allowed to inspect or approve locomotives prior to accepting them pursuant to a lease as a matter of either Helm's or the industry's practice. Therefore, the court reaffirms its conclusion that IANR failed to designate specific facts showing that there is a genuine issue for trial on this issue. *See* Memorandum Opinion and Order Regarding the Parties' Cross-motions for Summary Judgment, May 31, 2002, slip op. at 57 (as amended herein).

There are yet more grounds for rejecting IANR's attempts to alter or amend the summary judgment ruling concerning breach of the IANR Lease on the basis of its belated assertion that CAL. COM. CODE § 2207 states the governing law. IANR asserts that the conduct of the parties indicates that there was agreement to the terms of the amended lease, including Mr. Collins's addition, because Helm permitted IANR to inspect the locomotives offered under the lease. The court acknowledges that, under California law, "even if the offeree's acceptance is expressly made conditional on the offeror's assent to the offeree's additional terms, and no such assent is given, the existence of a contract and its terms may nevertheless be inferred if the parties' conduct recognizes the existence of a contract." *Transwestern Pipeline Co.*, 46 Cal. App. 4th at 514, 53 Cal. Rptr. 2d at 893 (citing § 2207(3)).**3**[2] However, the court concludes that IANR has failed to generate any genuine

[2]The court notes that the statute provides that "[c]onduct by both parties which recognizes the existence of a contract is sufficient to establish *a contract for sale* although (continued…)

issues of material fact that there was such a "contract inferred from conduct" here incorporating the additional terms added by Mr. Collins, because there was no conduct by Helm "recogniz[ing] the existence of a contract" including the "inspection and approval" terms. *See id.* Instead, Helm expressly objected to and rejected such terms by refusing to agree to the repairs demanded by IANR after IANR inspected the offered locomotives. In other words, while the additional terms required both "inspection and approval," and Helm may have permitted the "inspection," it never assented, in words or by conduct, to the "approval" part of IANR's additional term. Similarly, Helm's rejection on October 31, 2000, of the "approval" part of IANR's additional term, stated in IANR's October 6, 2000, response to Helm's offer, prevented the additional term from becoming part of the contract pursuant to § 2207(2)(c), because it constituted Helm's "[n]otification of objection to [the additional term] . . . given within a reasonable time after notice of [the additional term] [wa]s received."

In short, IANR's belated assertion that § 2207 of the California Commercial Code governs whether the terms it added to Helm's September 29, 2000, offer constituted a "counteroffer" does not change the disposition in the court's summary judgment ruling of any of the parties' claims, defenses, or counterclaims involving breach of the IANR Lease.

THEREFORE, IANR's June 12, 2002, "Motion to Alter or Amend Judgment" is **granted** to the extent that the court has corrected a typographical error on page 57 of the slip opinion of the May 31, 2002, Memorandum Opinion and Order Regarding the Parties' Cross-motions for Summary Judgment, as stated herein, but IANR's motion is otherwise **denied.**

IT IS SO ORDERED.

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[2](…continued)
the writings of the parties do not otherwise establish a contract." CAL. COM. CODE § 2207(3) (emphasis added). However, the court will assume, for the sake of argument, that this provision providing for "contract by conduct" also applies to a lease.

DATED this 17th day of June, 2002.

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MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA